85-770

No.____

Supreme Court, U.S.
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IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1985

IN RE:

MATTER OF GRAND JURY NO. 84-34
DISTRICT COUNCIL 33, DISTRICT
COUNCIL 33 HEALTH AND WELFARE
FUND, DISTRICT COUNCIL 33 LEGAL
FUND AND EARL STOUT,

Petitioners

v.

UNITED STATES OF AMERICA,

Respondent

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

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QUESTIONS PRESENTED FOR REVIEW

1. Where the record reflects that the prosecution harbors an unrelenting, vindictive desire to make a case against a specific target, and where there are substantial questions raised, properly supported by facts of record, regarding the propriety of the grand jury subpoena and the grand jury investigation itself, did not the Court of Appeals for the Third Circuit err in failing to order the district court to require the government to respond to Petitioners' Motion to Quash a Grand Jury Subpoena and for Discovery with additional facts by way of discovery which might provide the Court with a basis from which the Court could determine whether the grand jury's use of the Court's subpoena is proper?

2. Need not the government make some showing of facts prior to the enforcement of a grand jury subpoena, which showing may be less than probable cause but at least sufficient to enable the Court to establish that a grand jury investigation is not based on a whim or bad faith?

3. Where compliance with a grand jury subpoena directed to records held by an unincorporated association would cost the association untold thousands of dollars and unmeasurable administrative disruption, and the association's president has already once been the subject of a grand jury investigation which led to his trial and acquittal, must not the association's president have standing to participate in appellate proceedings determining the enforceability of the subpoena?

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OPINIONS BELOW

There are no reported opinions of the Court of Appeals or the district court concerning this case. The slip opinion of the Court of Appeals, dated August 9, 1985, appears in the Appendix at A1. The opinion of the United States District Court for the Eastern District of Pennsylvania, dated November 16, 1984, appears in the Appendix at A8. The district court's order denying Petitioners' Motion to Quash Grand Jury Subpoena and for Discovery appears in the Appendix as Exhibit "A."

JURISDICTION

The order of the Third Circuit dismissing Petitioner Earl Stout's appeal, and denying that of Petitioners Health & Welfare Fund and Legal Fund, from the district court's order denying the Motion to Quash Grand Jury Subpoena and for Discovery, was entered on August 9, 1985. Despite Petitioner's requests for rehearing, none was held by the Court of Appeals for the Third Circuit. This Court's jurisdiction is invoked under 28 U.S.C. §1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS

Federal Rule of Criminal Procedure 17(c):

Rule 17. Subpoena

(c) For Production of Documentary Evidence and of Objects. A subpoena may also command the person to whom it is directed to produce the books, papers, documents or other objects designated therein. The court on motion made promptly may quash or modify the subpoena if compliance would be unreasonable or oppressive. The court may direct that books, papers, documents or objects designated in the subpoena be produced before the court at a time prior to the trial or prior to the time when they are to be offered in evidence and may upon their production permit the books, papers, documents or objects or portions thereof to be inspected by the parties and their attorneys.

STATEMENT OF THE CASE

On or about the 21st day of August, 1984, District Council 33 was served with a subpoena duces tecum, ostensibly issued in the name of the Grand Jury, requiring the production of virtually all financial documents of District Council 33, District Council 33 Health & Welfare Fund and District Council 33 Legal Fund for a period of time of two (2) years:

> [You are commanded to bring] any and all ledger books, accounting records, and other documents reflecting all cash receipts, cash disbursements, accounts receivable, and accounts payable for District Council 33, District Council 33 Health & Welfare Fund, and District Council 33 Legal Fund, for the period 6/1/82 to the present.[1] (App. at Exhibit "E.")

Petitioner District Council 33, American Federation of State, County and Municipal Employees, AFL-CIO (hereinafter "District Council 33") is an unincorporated association representing over 12,000 employees of the City of Philadelphia.

Petitioner Earl Stout is the president of District Council 33, holding that office since 1974. During his tenure as president, District Council 33 established separate trusts, known as the District Council 33 Municipal Workers Health & Welfare Fund, and the District Council 33 Municipal Workers Legal Fund. These trusts provide District Council 33 members and their dependents with health/medical benefits and legal service benefits. By virtue of his position as president of District Council 33, Petitioner Earl Stout is Chairman of the Board of Trustees for each Fund.

Earl Stout has been and continues to be a target of the United States Attorney's Office and the Federal Bureau of Investigation. In pursuit of their target, the United States Attorney's Office and the Federal Bureau of Investigation (hereinafter "FBI") have utilized the powers of grand juries, and other means

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1. The compliance date of August 27, 1984 was extended by agreement among counsel until Wednesday, September 19, 1984.

as well, in order to secure information on which a criminal prosecution might be based.

In 1978, one such grand jury investigation was commenced by the United States Attorney's Office and the Federal Bureau of Investigation, based on their belief that Earl Stout was using his position as president of District Council 33 to receive "kickbacks." In November 1978, subpoenas were issued to District Council 33, District Council 33 Health & Welfare Fund and District Council 33 Legal Services Fund commanding the production of extensive records covering the period from 1974 to 1977. Those entities, including Petitioners herein, fully complied with those subpoenas. Massive inconvenience was caused to the Petitioners by this wholesale production of their records.

As a result of this investigation, a grand jury returned a 51-count indictment against Earl Stout and Peter J. Serubo and a superseding indictment which charged 48 counts of mail fraud, 47 of which accused Mr. Stout; 2 counts of violation of the Hobbs Act, 1 of which accused Mr. Stout; and 1 count of racketeering, accusing both Mr. Stout and Mr. Serubo. The charges were premised on an alleged scheme to defraud, the purpose of which was to obtain money or things of value for Earl Stout.

On October 27, 1980, trial of the above-referenced charges commenced before the Honorable Joseph S. Lord, III, then Chief Judge of the District Court for the Eastern District of Pennsylvania. Over the ensuing twenty (20) trial days, the government presented its evidence of the "guilt" of Mr. Stout. Upon the government resting its case, counsel for defendant, Earl Stout, moved for a judgment of acquittal. Chief Judge Lord, without even requiring the defendant to present any evidence, granted the motion because the United States had failed to prove that a crime had been committed: — "I feel that the Government has fallen short of proving that a crime has been committed." Despite this definitive finding by Chief Judge Lord, the United States Attorney himself stated that he would seek to reindict Mr. Stout for even the very same offense:

> There is a basic disagreement between the government and the judge as to what constitutes a fraud. However,

> that is what lawsuits are all about. Frauds involving unions and union pension funds are very subtle. In this instance, the court disagreed as to what we contended the fraud to be. If such a case arose again, I'd not hesitate to bring a prosecution.

Philadelphia Daily News, November 25, 1980 at 1, 4. This statement demonstrates graphically the government's attitude toward Mr. Stout, which encompasses the obvious intention to harass and oppress him, even for conduct which has been determined by the trial court to constitute no criminal act whatsoever.

Despite the judgment of acquittal, Mr. Stout had been subjected to the ordeal of the grand jury proceedings and trial, with the attendant embarrassment and expense. In addition to the obvious financial burden involved in a three-week trial and the underlying months of pretrial preparation, there was the additional cost to the Petitioners herein of collecting, preparing, duplicating and transferring voluminous records, as well as the cost occasioned by the deprivation of those records, which cover a four-year period, for over two years. Not only were Petitioners District Council 33 and the Funds deprived of their records, they were also deprived of the time and services of their employees who had to perform the necessary work in order to comply with the grand jury subpoenas, and who also had to appear before the grand jury and testify, all of this in a case where no crime was committed. Finally, Petitioners District Council 33 and Funds were also deprived of the services of Mr. Stout, who, preparing for his defense and appearing at trial, was obviously unable to attend to the myriad responsibilities of his office.

Despite the entry of the Order granting Mr. Stout's Motion for Acquittal, Mr. Stout was severely damaged and humiliated by the press coverage of his case. The coverage by the media was so inflammatory and distorted that Chief Judge Lord himself was compelled to call the media to task, stating on the record: "The difficulty is that those evidentiary matters in the reporting of them by the media, were distorted, they were slanted, they were inaccurate, they were unfair, and they were prejudicial to the defendant."

Based in part upon the notoriety occasioned as a result of the federal prosecution of Mr. Stout, other entities have claimed to possess "facts" warranting a grand jury investigation. For example, in January of 1983, the Philadelphia District Attorney's Office utilized a state investigating grand jury to issue subpoenas for, *inter alia*, financial documents of District Council 33, District Council 33 Health & Welfare Fund and District Council 33 Legal Fund, representing that it was investigating allegations that criminal violations had been committed by Mr. Stout in connection with the financial management of District Council 33 and the Funds. District Council 33, District Council 33 Health & Welfare Fund and District Council 33 Legal Fund fully complied with the grand jury subpoenas. No charge of any kind was lodged as a result of the investigation. Indeed, on May 1, 1985, after a grand jury investigation of two year's duration, the District Attorney determined that no evidence of wrongdoing existed and that no further investigation need occur.

Given the history of misguided persecutions of Mr. Stout by the United States Attorney's Office and the FBI, on receipt of the August 1984 subpoenas, counsel met with John T. Rosenberg, Esquire, Assistant U.S. Attorney, who had caused the subpoena to be issued, in an effort to provide him whatever information from Petitioners he required in order to show him that, as in 1980, no criminal violations had occurred. Counsel offered full access to any and all pertinent records in order to avoid the anguish and expense to Petitioners herein of yet another needless and baseless federal grand jury investigation. This offer was conditioned only on the United States Attorney advising what crime he was investigating.

The United States Attorney refused the offer, stating that he demanded production of all the records subpoenaed, and that he would not state what crime is allegedly under investigation. Petitioners then filed a Motion to Quash the Grand Jury Subpoena and for Discovery with the District Court, seeking an evidentiary hearing to present before the trial court record evidence establishing the impropriety of the subpoena.

The United States Attorney, only *after* Petitioners filed the Motion to Quash the Subpoena, provided within his response an

affidavit pursuant to the Third Circuit's holding in *In Re Grand Jury Proceedings — (Schofield)*, 507 F.2d 963 (3d Cir. 1975)[2]; this affidavit was a mere boilerplate statement, void of any substance whatsoever.

After the Motion was denied, Petitioners Stout and the Funds took an appeal to the United States Court of Appeals for the Third Circuit. The United States voluntarily agreed to a stay of enforcement of the grand jury subpoena pending the resolution of the appeal. After briefing and oral argument, the Court of Appeals, in a panel opinion dated August 9, 1985, held that Petitioner Earl Stout lacked standing to contest the lower court order because he had failed to allege a property right or privilege in the documents.[3] The Third Circuit further held that the lower court did not err in denying Petitioner Funds' requests that the government establish for the Court some facts respecting the nature of the crime under investigation, placing instead the burden on the petitioners to demonstrate some "irregularity" in the grand jury proceedings. Indeed, the Third Circuit held that the government is not even required to proffer some kernel of information relevant to the commission of any crime before the Court's subpoena, issued in the name of the grand jury, may be enforced.

Given the facts set forth herein, the Court of Appeals erred in failing to require the trial court to require the government to provide indicia that the United States Attorneys' Office and the Federal Bureau of Investigation have a sufficient good-faith basis

2. In *Schofield*, the Court of Appeals held, pursuant to its supervisory powers over grand jury proceedings, that the Court requested to enforce a subpoena may require the government to submit an affidavit stating that each item sought is relevant to an investigation properly within the grand jury's jurisdiction, and is not sought primarily for some other purpose. 507 F.2d at 966.

3. As Mr. Stout is President of District Council 33 and, therefore President of each of the Funds, one wonders how the Court could determine that Mr. Stout has no property right or privilege in the documents subpoenaed from the very entities over which he presides. He certainly has the duty to protect the Funds from unnecessary expenditures, such as would be caused by their compliance with the subpoena, and thus should be deemed to have standing.

undergirding a lawful grand jury inquiry, upon which this subpoena and the grand jury investigation are allegedly based.

REASONS FOR GRANTING THE WRIT

I.
The Target Of A Grand Jury Investigation, Who Is The President Of An Organization Served With A Grand Jury Subpoena, Must Have Standing To Challenge On Appeal The Legality Of That Subpoena.

In the proceedings below, Earl Stout asserted a necessary and compelling interest in the subpoenaed materials sufficient to enable him to move to quash the subpoena served upon District Council 33. Mr. Stout is President of District Council 33 and, by dint of that office, the Chairman of the Board of Trustees of both District Council 33 Health & Welfare Fund and District Council 33 Legal Fund. He certainly has a legal interest in the subpoenaed materials. Indeed, as the target of this grand jury investigation and the victim of the predecessor grand jury investigation, he, more than anyone, has a substantial interest in the subpoena. Yet, if this Court does not recognize that his interest must be sufficient to clothe him with appellate standing, the District Court's Order denying his Motion to Quash is unreviewable. Since Mr. Stout cannot be held in contempt for failing to comply with a subpoena not issued to him, the Third Circuit's holding obviates Mr. Stout's ability to ever raise on appeal the invalid grand jury process issued in this matter. If the subpoena is enforced and no indictment ensues, Mr. Stout is without a forum in which he may secure appellate review of the propriety of the subpoena. If the subpoena is enforced and an indictment is brought against Mr. Stout, nonetheless, he cannot challenge such indictment based upon the grand jury's receipt of the materials derived from the subpoena served on District Council 33.

Yet, despite a clear showing that Mr. Stout has a legally protected interest in the subpoenaed materials by virtue of his status as a target of the investigation and as president of the entities whose records were subpoenaed, the Third Circuit Court of Appeals concluded that Mr. Stout did not have standing to

appeal from the denial of his motion to quash the grand jury subpoena.

It is respectfully submitted that this Court should now consider whether the target of a grand jury investigation, who is also the president of the organization whose records are subpoenaed, has standing to challenge on appeal the propriety of that subpoena.

The law governing the appealability of a denial of a motion to quash a grand jury subpoena is quite clear.

> [O]ne to whom a subpoena is directed may not appeal the denial of a motion to quash that subpoena but must either obey its commands or refuse to do so and contest the validity of the subpoena if he is subsequently cited for contempt on account of his failure to obey.

United States v. Ryan, 402 U.S. 530, 532 (1971). *See also Cobbledick v. United States*, 309 U.S. 323 (1940); *Alexander v. United States*, 201 U.S. 117 (1906). And without a contempt citation, the denial of a motion to quash a grand jury subpoena is interlocutory and lacks the finality required by 28 U.S.C. §1291. An exception to the *Alexander-Cobbledick-Ryan* rule, however, provides that when a person lacks the opportunity to contest the subpoena by disobedience, because he is not subject to its commands, any order denying a Motion to Quash the Subpoena is final as to him.

Since *Perlman v. United States*, 247 U.S. 7 (1918), persons affected by compelled disclosure of materials to a grand jury may intervene to secure their rights, and obtain immediate appellate review if the protection sought is denied by the trial court. In *Perlman*, this Court held that the owner of exhibits could intervene in a grand jury proceeding to object to their disclosure, even though such exhibits were subpoenaed from a third party, a corporation which he had formed. In so holding, this Court reasoned that a person asserting a right must necessarily be provided with an appellate forum where his claim could be considered. *Perlman*, by holding that a trial court order denying the petitioner intervention was a final order for purposes of appeal,

recognized the petitioner's entitlement to an appellate forum for vindication of these rights.

Perlman thus limits the power of a grand jury to proceed against a target through subpoenas to disinterested third parties, and to preclude a target from securing judicial review of such proceedings. The ongoing vitality of *Perlman* is unchallenged.

Where privilege is asserted, the vast majority of Courts of Appeal have recognized the right of a third-party client to immediate appellate review of orders compelling testimony, or production of documents, from his attorney. *In re Grand Jury Subpoena (Bierman)*, 765 F.2d 1014, 1018 (11th Cir. 1985); *In re Sealed Case*, 737 F.2d 94, 98 n.6 (D.C. Cir. 1984); distinguishing *National Super Spuds, Inc. v. New York Mercantile Exchange*, 591 F.2d 174 (2d Cir. 1979); *In re Grand Jury Proceedings (Gordon)*, 722 F.2d 303, 306-07 (6th Cir. 1983) *cert. denied sub nom. Doe v. United States*, 104 S.Ct. 3524 (1984); *In re Special Grand Jury (Harvey)*, 676 F.2d 1005, 1008 (4th Cir. 1982) *withdrawn* 697 F.2d 112 (4th Cir. 1982); *In re Grand Jury Subpoenas Duces Tecum (Marger/Merenbach)*, 695 F.2d 363 (9th Cir. 1982); *In re Grand Jury Proceedings (Fine)*, 641 F.2d 199 (5th Cir. 1981); *In re Katz*, 623 F.2d 122 (2d Cir. 1980); *In re Grand Jury Proceedings (Malone)*, 655 F.2d 882 (8th Cir. 1981); *Velsicol Chemical Corp. v. Parsons*, 561 F.2d 671 (7th Cir. 1977,) *cert. denied* 435 U.S. 942 (1978). Only two circuits continue to adhere to discredited doctrine denying a client an immediate appeal where a court order directs his attorney to produce privileged documents or to testify regarding confidences. *See In re Grand Jury Proceedings (Vargas)*, 723 F.2d 1461, 1465-66 (10th Cir. 1983) (attorney must first risk contempt); *In re Oberkoetten*, 612 F.2d 15 (1st Cir. 1980), *app. for stay denied*, 444 U.S. 1041 (1980). The weight of authority recognizes the need to allow a party whose interests are unprotected to appeal immediately from denial of a motion to quash a subpoena directed at a third party.

In this regard, the case of *In Re Grand Jury (C. Schmidt & Sons, Inc.)*, 619 F.2d 1022 (3d Cir. 1980), is instructive. In *Schmidt*, grand jury subpoenas had been served upon six employees of C. Schmidt & Sons, Inc., and not the corporation. The

employees, and Schmidt as an intervenor, moved to quash the subpoenas, asserting that the grand jury was not investigating federal crimes and that the investigation was being conducted in bad faith. When the motion to quash was denied, the employees and Schmidt filed a notice of appeal, and the district court stayed the compliance order pending appeal. The employees never faced the question whether they would disobey the order directing compliance and thereby invite a contempt citation.

In reliance on the *Alexander-Cobbledick-Ryan* rule, the Court of Appeals dismissed the appeal of the employees, since they had not been cited for contempt. The appeal of Schmidt, however, was permitted to proceed, because, as an unsubpoenaed party, it had no "option of resisting compliance and standing in contempt." *Schmidt*, 619 F.2d at 1024. In determining that Schmidt, in asserting a property right or privilege in the services of its employees, may as an intervenor appeal the denial of the motion to quash the subpoena, the court stated that:

> [d]espite its tacit acknowledgement that there is no other point in any later proceeding at which Schmidt's claim of unlawful grand jury harassment may be raised, the government urges that its *Colucci*, *Sun Company* and *U.S. Steel* appeals presented different issues. They did, indeed, but the differences do not bear upon finality, and on appellate jurisdiction, but on standing, and on the merits of the claim for relief.

619 F.2d at 1026. The court went on to state that the government was seeking a holding inconsistent with case history, by contending that only those directly subjected to the grand jury process would have standing to challenge grand jury abuse.

> In substance what the government seeks is a holding that there is no set of circumstances in which anyone other than a witness subjected to grand jury process will be heard to complain about grand jury abuse.

619 F.2d at 1026.

The viability of *Schmidt* in the Third Circuit is clear. *See, e.g., Gross v. G.D. Searle & Co.*, 738 F.2d 600, 604 n.6 (3d Cir.

1984); *In Re Grand Jury Matter Impounded*, 703 F.2d 56, 57-58 (3d Cir. 1983); *Wm. T. Thompson Co. v. General Nutrition Corp.*, 671 F.2d 100, 103 (3d Cir. 1981); *United States v. Cuthbertson*, 651 F.2d 189, 193 (3d Cir. 1981); *Appeal of Hughes*, 633 F.2d 282, 286 (3d Cir. 1980). It has also been followed outside the circuit. *See, e.g., In Re Sealed Case*, 737 F.2d 94, 98 n.6 (D.C. Cir. 1984); *In Re Berkley & Co., Inc.*, 629 F.2d 548, 551 (8th Cir. 1980).

In the instant case, the petitioner's Motion to Quash Grand Jury Subpoena and For an Order Granting Discovery set forth facts which establish that the subpoena at issue is part of a pattern of harassment of Mr. Stout, petitioner herein. As President of District Council 33 and the two Funds, he certainly has a protected property interest. Moreover, only Mr. Stout has a sufficient stake in the outcome of the grand jury proceedings here at issue to warrant risking contempt in order to have appellate standing. Yet, by circumventing Mr. Stout through service of the subpoena on District Council 33, the government precluded Mr. Stout from being in a position to make the Order final by being held in contempt.

It is respectfully submitted that this Court should consider whether the target of a grand jury investigation, who is also the president of the organization whose records are subpoenaed, has standing to challenge an appeal where the purpose of the investigation is improper.

II.
The Court Of Appeals Erred In Affirming The Trial Court's Denial Of Petitioners' Motion To Quash A Grand Jury Subpoena Based On The Pretext Of A Lawful Investigation

The Court of Appeals for the Third Circuit erred in holding that the prosecutor responsible for issuing a grand jury subpoena duces tecum need not adduce even a kernel of information relevant to the commission of a specific crime before a court can properly enforce the court's subpoena issued by a grand jury. In its holding, the Court of Appeals misinterpreted this Court's

holdings respecting the courts' role in grand jury investigations, and failed to adhere to its obligation to protect the rights of individuals haled before grand juries in the course of grand jury investigations. Because no court of record has ever articulated a standard respecting the threshhold of facts upon which a grand jury investigation may lawfully be based, this fundamental issue cries out for review by this Court.

It is a well established principle that a federal grand jury may only issue the court's subpoena to aid in the investigation of crimes committed against the United States. In accomplishing its mission, the grand jury not only must determine whether a crime has been committed, but also must protect the innocent from unbridled and vindictive prosecutorial conduct. *Branzburg v. Hayes*, 408 U.S. 665 (1972).

To aid in its investigations, grand juries have the power to issue the court's subpoena. This subpoena, however, is not self-executing. When the subpoena is challenged, the court itself must determine whether the grand jury investigation is illegitimate or the process issued vindictively. *Gelbard v. United States*, 408 U.S. 41, 59-60 (1972); *Branzburg*, 408 U.S. at 686-87.

In order to assure that a grand jury performs the accusatory and protective functions adequately and fairly, its subpoenas, issued in the name of the Court, must be reviewed by the court. As this Court stated in *Brown v. United States*, 359 U.S. 41 (1959):[4]

> A grand jury is clothed with great independence in many areas, but it remains an appendage of the Court, powerless to perform its investigative function without the Court's aid, because it is powerless itself to compel the testimony of witnesses. It is the Court's process which summons the witnesses to attend and give testimony, and it is the court which must compel a witness to testify . . .

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4. *Rehearing denied*, 359 U.S. 976 (1959), *overruled on other grounds*, *Harris v. United States*, 382 U.S. 162 (1965).

359 U.S. at 49.

It is essential that federal courts have power over grand jury processes to prevent abuse, oppression and injustice. It was made clear in the case of *United States v. Dionisio*, 410 U.S. 1 (1973), which cited *Branzburg*, that:

> [T]he Constitution could not tolerate the transformation of the grand jury into an instrument of oppression: "Official harrassment . . . undertaken not for purposes of law enforcement but to disrupt a reporter's relationship with his news sources would have no justification. Grand juries are subject to judicial control and subpoenas to motions to quash."

410 U.S. at 12.

This supervisory role is even more important given the factual realities of the manner of operation of a federal grand jury. Grand juries are "basically a law enforcement agency." *United States v. Cleary*, 265 F.2d 459, 461 (2d Cir. 1959), *cert. denied*, 360 U.S. 936 (1959). Moreover, as the Court of Appeal stated in *In re: Grand Jury Proceedings*, 486 F.2d 85 (3d Cir. 1973), *aff'd on reh'g. after remand*, 507 F.2d 963 (3d Cir. 1975), *cert. denied*, 421 U.S. 1015 (1975), (hereinafter "*Schofield I*" and "*Schofield II*," respectively):

> They are for all practical purposes an investigative and prosecutorial arm of the executive branch of government, [and subpoenas] are issued pro forma and in blank to anyone requesting them. The Court exercises no prior control whatsoever upon their use . . . they are in fact almost universally instrumentalities of the United States Attorney's Office or of some other investigative or prosecutorial department of the Executive Branch. Grand Jury subpoenas, then, when they are brought before the federal courts for enforcement, for all practical purposes are exactly analogous to subpoenas issued by a federal administrative agency on the authority of a statute without any prior judicial control.

Schofield I, 486 F.2d at 90.

Indeed, grand jury subpoenas may be issued by the United States Attorney without the knowledge or participation of the grand jury, which grand jury may not even know of the existence of an investigation. *United States v. Santucci*, 674 F.2d 624 (7th Cir. 1982) *cert. denied*, 459 U.S. 1109 (1983). Under such circumstances, absent timely intervention by the court, no check whatsoever of the prosecutor's use of grand jury subpoenas can occur.

Here, the Court of Appeals for the Third Circuit held that although the target of an unidentified criminal investigation has shown that the subpoena's instigator has, at an earlier date, subpoenaed similar records, returned an indictment, had trial court dismissal of the case for want of any criminal offense, and made statements indicating a desire to repeat the very same prosecution regardless of the acquittal, nonetheless he himself must demonstrate that the current subpoena issued to a third party was issued "to further an illegitimate purpose" before a court will protect him from the power of the prosecutor. At the same time, the trial court denied the target the opportunity to secure facts through discovery or otherwise which could establish further the "illegitimate purpose" and the appellate court denied the target standing to raise the issue. Appendix at A8. The Court of Appeals' holding is clear: courts will not intervene in grand jury proceedings to protect the rights of citizens unless the citizens can somehow prove their innocence of unidentified charges beforehand.

Courts of Appeal have, on occasion, afforded to potential targets of the grand jury certain procedural protections. These protections are designed to require the United States Attorney to provide some information relating to the predicate for the grand jury investigation. In the Third Circuit, such supervision was judicially imposed by the holding in *Schofield I*, 486 F.2d 85 (3d Cir. 1973). In *Schofield I*, a subpoenaed party, Schofield, was found to be in contempt for refusing to supply fingerprints, a photograph and a handwriting exemplar to the grand jury. Throughout the contempt proceeding and on appeal, Schofield

asserted that "before she be required to comply with the Government's request (1) the Government state the purpose and necessity for requesting [the evidence] . . ." *Schofield I*, 486 F.2d at 88. The government relied on *United States v. Dionisio* and *United States v. Mara*, 410 U.S. 19 (1973), to support its countervailing contention that no such showing was necessary.

The Court of Appeals found *Dionisio* and *Mara* inapplicable because "[n]either . . . involves any question as to the propriety of the grand jury's investigation, [or] the legitimacy of the purpose for issuing the subpoenas . . ." *Schofield I*, 486 F.2d at 89. Nonetheless, the *Schofield* Court went on to impose a procedural rule, pursuant to its supervisory power over grand juries, that "the Government be required to make some preliminary showing by affidavit that each item [sought by subpoena] is at least relevant to an investigation being conducted by the grand jury and properly within its jurisdiction, and is not sought primarily for another purpose." *Schofield I*, 486 F.2d at 93. The Court reasoned: "Authority for obtaining [the desired evidence] exists, if at all, because [it is] somehow relevant to the grand jury's investigation of an offense falling within its jurisdiction." *Schofield I*, 486 F.2d at 93. Obviously, then, the Court in *Schofield I* required the United States Attorney to show that he possesses some kernel of information upon which the jurisdiction of the grand jury may be based.

Schofield I was reaffirmed by the Court of Appeals in *Schofield II*, *supra*, where the Court expounded upon the scope of the district court's discretion in judging the adequacy of the government affidavits:

> *Schofield I* emphasizes that where the district court is not satisfied with the affidavits presented by the government, whether because the matters set forth challenge the court's credibility or because the witness has made some colorable challenge to the affidavits, the court *can* require more.
>
> The district judge is vested with considerable discretion in determining whether additional proceedings are warranted. Various avenues of inquiry are open to

> a court which questions the sufficiency of the affidavits, among them discovery, *in camera* inspection, additional affidavits and a hearing.

507 F.2d at 965. The clear import of *Schofield II* is that the district court is not merely a rubber stamp for the validation of court process issued in its name by the grand jury.

Several Courts of Appeal, following this Court's holdings in *Branzburg*, *Brown*, and *Dionisio*, have imposed similar disclosure requirements upon prosecutors desireous of enforcing grand jury subpoenas duces tecum. For instance, in *In Re Grand Jury Subpoena Served Upon Doe*, 759 F.2d 968 (2d Cir. 1985), *rehrg en banc granted*, the Court of Appeals for the Second Circuit held that it would require the prosecution to show both relevance and a need for certain documents before it would enforce a grand jury subpoena. In the context of the attorney-client relationship, the *Doe* court noted that when constitutional rights are implicated, the government must bear the burden of proving *both* the relevance of the subpoenaed materials to the grand jury investigation and the need for the precise materials sought before a grand jury subpoena may be enforced. 759 F.2d at 975. The *Doe* court concluded that while the government had shown that the materials were relevant,[5] it had failed to show the "im-

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5. The *Doe* court stated in this regard:

> A grand jury in the Eastern District of New York is currently investigating an organized crime family. Of particular relevance is the grand jury's consideration of evidence that may establish that a certain faction of the crime family constitutes an "enterprise," as that term is defined in 18 U.S.C. §1961(4) (1982) (a portion of the RICO statute), and that Client headed that "enterprise." As part of this inquiry, the grand jury is interested in determining whether Client paid for, or otherwise arranged for, the legal representation of members of his "crew" (as the faction is known) who were apprehended during the commission of illegal activity. This would, according to the Government, tend to indicate the existence of an enterprise within the meaning of the RICO statute and to point to Client as the leader. In an effort to establish whether Client actually paid or arranged for the legal representation, the grand jury caused a subpoena duces tecum to be served upon his attorney, a lawyer who has represented Client for approximately the last 18 years. The subpoena called for the attorney's appearance and the production of records of "fees, monies,

portant need" for the materials subpoenaed, and that such need outweighed the client's rights. *Id.* at 977. In this case, unlike the situation in *Doe*, the government has failed to demonstrate that the subpoenaed materials bear even one iota of relevance to the investigation — indeed, the government has refused to identify the criminal activities at issue, other than providing a reference to provisions of the United States Code. No showing whatsoever of need has been undertaken by the government, nor has any balance between that need and the rights of Petitioners been struck.

In placing the initial burden of showing relevance on the prosecution, the Second Circuit in *Doe* relied in part on its earlier holding in *In Re Horowitz*, 482 F.2d 72 (2d Cir. 1973). There, the Court had held that when the targets' accountant was commanded, pursuant to a grand jury subpoena, to produce "three file cabinets" of records, and when the government had not shown that all the materials demanded would be relevant to the investigation, the subpoena would be limited, with respect to materials outside the time period at issue, to those for which the government could make a minimal showing of relevance. The Court held that, with respect to records inside the time period at issue, the burden fell on the targets to show a *lack* of relevance. 482 F.2d at 79-80. In order to meet this burden, as is reflected in the *Horowitz* opinion itself, the government had disclosed to the targets the substantial factual bases undergirding the grand jury investigation itself in great detail.

Of particular note in *Horowitz* is the absence of any federally recognized privilege between accountant and client-target. Indeed, the accountant whose records had been subpoenaed did not assert that the files were protected. Nonetheless, the

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property or other things of value received, accepted, transferred or held by [him] . . . on his behalf, from, on account of, or on behalf of" twenty-one individuals, several of whom are members of Client's "crew."

739 F.2d at 970. In contrast to the details provided by the government in *Doe*, the government here has asserted only that the grand jury is investigating possible violations of 18 U.S.C. §1962 and 18 U.S.C. §1341.

Horowitz court fully weighed the claims of targets, after disclosure of the factual predicates undergirding the investigation, despite the absence of a privilege recognized by the federal courts. This facet of *Horowitz* is especially important in light of the facts of the instant case, where no privilege is asserted.

The *Horowitz* Court premised its holding on relevance of the subpoenaed documents to the matter under investigation. It goes without saying that the failure of a Court to receive details about the subject matter of a grand jury investigation precludes it from determining whether a subpoena is infirm for want of relevance or, if relevant, whether a subpoena is overbroad.

It also should be noted that the Court in *Horowitz* specifically recited the facts undergirding the investigation, and the laws the targets were suspected of violating:

> Allegedly the investigation developed evidence that sums up to $20,000,000 had been diverted into the hands of various corporations, including Canequip Exports Ltd., a Canadian corporation, and of Kasser and other individuals. After seizure of Canequip's records in Montreal pursuant to a search warrant on July 14, 1971, some $220,000 was allegedly drawn from Canequip's bank account with the Royal Bank of Canada in Montreal, deposited to Canequip's account in a bank in New York City and later wired to an account in Switzerland. A grand jury in the Southern District of New York is investigating whether this transaction and others violated United States criminal laws, particularly 18 U.S.C. §2314, which prohibits the interstate or foreign transportation of funds obtained through fraud.

482 F.2d at 79. Thus, the targets in *Horowitz* had some basis from which to argue their claims of relevance. Here, because the government has remained mute save for reference to two United States Code provisions, Petitioners cannot even begin to show the lack of relevance of the subpoenaed materials to the investigation. The Court of Appeals, in essentially requiring Petitioners to show the materials lack relevance to a legitimate inquiry, without requiring the government to disclose the nature of the

inquiry, has placed an impossible burden on Petitioners and precluded the court itself from ever being able to make any determination respecting relevance.

Another case of import is *In Re Special Grand Jury No. 81-1 (Harvey)*, 676 F.2d 1005 (4th Cir. 1982) (*withdrawn* 697 F.2d 112 (4th Cir. 1982)). In *Harvey*, the Court of Appeals for the Fourth Circuit held that where the government had refused to provide the subject of the subpoena with details of the grand jury investigation, the Court would not enforce a grand jury subpoena directed to the target's attorney. In this regard,[6] the court stated:

> The government has consistently refused to reveal any details regarding the purpose of the grand jury investigation. It has disclosed only that the investigation relates to possible tax fraud and drug offenses and indicated in oral argument that the subpoenaed documents might be used as a basis for a net worth tax evasion prosecution. With such sketchy disclosure of the purposes for which the documents are sought, Harvey is unable to articulate, and this court is unable to discern, whether disclosure of the documents would implicate him in the criminal activity for which the representation was sought.

In another case, *In Re Grand Jury Witness (Salas)*, 695 F.2d 359 (9th Cir. 1982), the Court of Appeals held that when persons subject to a grand jury subpoena duces tecum argued privilege, the Court could require the materials to be produced to be inspected *in camera* so that the court could determine whether the subpoena was proper. In *Salas*, a grand jury had subpoenaed correspondence, bills, ledgers, statements and time records of an attorney relating to unsubpoenaed clients. The Court held that if the attorneys contested the subpoena, the government, which was investigating possible tax code violations, could obtain

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6. While the opinion in the case was withdrawn after the subject of the investigation became a fugitive, 697 F.2d 112 (4th Cir. 1982), the court's rationale is valid and compelling.

enforcement only after an adversarial hearing at which the attorney could present his position through introduction of evidence and argument.

As was reflected in *Salas* itself, the government had disclosed the names of the targets and the incidents under investigation, so that the attorneys had notice of the precise issues to be addressed. Here, of course, no court has ever permitted such disclosure to counsel, or even directed such disclosure *in camera* and *ex parte*.

In *Schofield*, in *Doe*, in *Salas*, in *Harvey*, and in *Horowitz*, Courts of Appeal have followed the lead of this Court in protecting the individual against the tyranny of an unbridled prosecutor abusing the trial court's subpoena power issued in the name of the grand jury, by requiring at the very least a disclosure of the events under investigation, as well as the criminal statutes ostensibly implicated. In its instant holding, the Court of Appeals for the Third Circuit clearly has abrogated its responsibility as protector of the individual in the grand jury setting, and this Court ought to remedy the lower Court's misapprehension as to its role.

The Court of Appeals indicated that, despite the facts of record, the issuance of the instant subpoena was not harassment. It is difficult to conceive of circumstances under which any court would find harassment if the Court of Appeals' holding is left undisturbed. For instance, in *In Re Grand Jury*, 619 F.2d 1022 (3d Cir. 1980) (hereinafter "Schmidt"), the same Court of Appeals found no harassment although the subject of the investigation had been forced to endure four successive grand jury investigations, none of which had ever resulted in an indictment being returned. In *Schmidt*, a corporation intervened to move to quash grand jury subpoenas issued to six of its employees. The Government filed a *Schofield* affidavit which alleged that the subpoenas were "issued solely to further . . . investigation and [are] not intended as a harassment or a fishing expedition." *Id.* at 1028. In its motion to quash, Schmidt contended that the subpoenas were the product of harassment and a fishing expedition, manifesting prosecutorial bad faith as evidenced by, *inter alia*, the fact that "Schmidt has been the subject, for over four and one

half years and during the life of four strike force grand juries, of continuing strike force attention, none of which has yet to result in an indictment." *Id*. The Court of Appeals upheld the district court's refusal to quash on the basis of successive grand jury harassment because "[n]either in its initial motion, nor in its motion to reconsider, did Schmidt give any specifics about the subject matter of those grand jury investigations which took place . . . ." *Id*. at 1029.

It can be inferred from this that Schmidt's failure to provide an adequate factual basis for its motion to quash precluded consideration of its challenge to the *Schofield* affidavit.[7] It also should be noted that if the Court of Appeals found no harassment in *Schmidt* and in the instant case, the Court of Appeals would never find harassment under any circumstances.[8] Because the lower courts are in need of guidance from this Court on this very important topic, this Court should hear this case.

In addition to requiring prosecutors to disclose the nature of their grand jury investigations and to demonstrate a need for information sought by subpoena, courts have held that prosecutors cannot, on the pretext of a criminal investigation, instigate investigations predicated on bad faith and harassment. In the case of *Ealy v. Littlejohn*, 569 F.2d 219 (5th Cir. 1978), a county grand jury was called to investigate the fatal shooting of a Black youth by law enforcement officers of Marshall County, Mississippi. The District Attorney, Talmadge Littlejohn, presented the case of the homicide to the Marshall County grand jury. The grand jury failed to return *any* indictments against any of the officers who had custody of the youth the night of his death.

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7. It must be conceded therefore that where a motion to quash is properly supported by facts which call into question the propriety of the grand jury subpoena or even the grand jury investigation, the government must respond with additional facts by way of discovery which convince the court that the subpoena is proper.

8. *Compare* the Third Circuit's holdings in *Schmidt* and the instant case *with* that of the First Circuit in *In Re Grand Jury Matters*, 751 F.2d 13 (1st Cir. 1984), holding that where the U.S. Attorney had subpoenaed attorneys and their records with respect to clients accused of drug law and tax code violations, the lower court's finding of "harassing" conduct would not be disturbed.

After the grand jury had been recessed, the Marshall County United League (an association of Black citizens) prepared and circulated a leaflet accusing the area law enforcement officers of failing to conduct a serious investigation. Further, it accused Littlejohn of acting as a defense attorney for the officers being investigated, and labeled the grand jury hearing a "farce." Subsequently, through Littlejohn, the grand jury issued subpoenas to the members and all of the officers of the United League, and issued a subpoena duces tecum directed toward the association's records and minutes.

Upon reconvening, the grand jury attempted to ascertain whether any League members had personal knowledge, or knew of anyone with personal knowledge, of the facts surrounding the fatal shooting of the youth. The grand jury also investigated the origin of the leaflet and the information on which the accusations were based and questioned League members and officers about the organization's internal and financial operations and activities. The Court of Appeals, in reversing and remanding the denial of a preliminary injunction seeking to forestall the grand jury investigation, held that, although the grand jury was entitled to investigate the homicide of the Black youth, it could not utilize the pretext of such investigation as the basis for an invalid grand jury investigation.

Indeed, the court in *Ealy* opined, as the Petitioners pray that this Court will hold, that

> [i]t would be a sorry day indeed were we to allow a grand jury to delve into the membership, meetings, minutes, organizational structure, funding and political activities of unpopular organizations on the pretext that their members might have some information relevant to a crime.

569 F.2d at 229.

Ealy, therefore, necessarily holds that even though the subject matter of an alleged investigation may be within the proper jurisdiction of a grand jury, and even if a witness called before that grand jury may have information relevant to that inquiry,

nevertheless, the investigation cannot proceed where facts developed establish that the stated purpose of the investigation is merely a pretext. *Ealy*, therefore, compels the conclusion that the subpoena issued in this case be quashed because, as has been set forth above, it appears that the "factual" predicate for this subpoena is a mere pretext and is a continuation of a lengthy pattern of harassment of Mr. Stout by the United States Attorney and the FBI.

Rather than acting to eradicate the abuse which such unchecked prosecutorial misconduct poses, the Court of Appeals failed to order the district court to hold an evidentiary hearing or permit Petitioners to take discovery which, under the watchful eye of the trial court, would permit the court to ascertain the factual basis underlying the prosecutor's actions, if any such basis exists. The hearing and discovery should have occurred in order to determine the efficacy of not only the subpoena, but of the entire grand jury investigation.

III.
A Grand Jury Investigation Must Be Based On Some Quantum And Type Of Information So That It Is Not Arbitrary, Unjust, The Product Of Government Animosity Or In Derogation Of The Rights Of The Subpoenaed Party Or Target

The tendency to aggrandize the investigative power of grand juries has been supported by judicial pronouncements such as that in *United States v. Calandra*, 414 U.S. 338, 343 (1974):

> Traditionally the grand jury has been accorded wide latitude to inquire into violations of criminal law. . . . "It is a grand inquest, a body with powers of investigation and inquisition, the scope of whose inquiries is not to be limited narrowly by questions of propriety or forecasts of the probable result of the investigation, or by doubts whether any particular individual will be found properly subject to an accusation of

> crime." *Blair v. United States*, 250 U.S. 273, 282, 39 S.Ct. 468, 471, 63 L.Ed. 979 (1919).

414 U.S. at 343; *Accord, In Re Grand Jury Proceedings (United States Steel-Clairton Works)*, 525 F.2d 151 (3d Cir. 1975); *Robert Hawthorne, Inc. v. Director of Internal Revenue*, 406 F.Supp. 1098 (E.D. Pa. 1976).

Even in *Calandra*, however, this Court recognized that the grand jury, albeit powerful, must temper its exercise of authority with responsibility. This Court stated that the dual functions of a grand jury are "to discover and present for trial persons suspected of criminal wrongdoing and [to protect] citizens against arbitrary and oppressive governmental action." 414 U.S. at 343.

Thus, it is imperative that, in stridently pursuing the objective of ferreting out criminal activity, and bringing its perpetrators to the bar of justice, the grand jury does not abdicate its concomitant responsibility, inherent in its roots, to protect the individual from the unrestrained forces of the overzealous and sometimes vindictive investigative and prosecutorial personnel of the Government. The duty of protecting the individual is as important as that of investigating criminal activity. And the court responsible for supervising grand jury activities and deciding whether a subpoena issued in furtherance of an investigation should be enforced likewise must be vigilant in scrutinizing the purposes underlying the investigation.

The term "arbitrary and oppressive governmental action" encompasses the situation wherein a grand jury investigation is conducted in the absence of a proper factual or informational basis. Consequently, when a grand jury investigation is premised not on facts, but rather on the ill-will, animosity or suspicion of prosecutors and law enforcement personnel acting in the name of a grand jury, the investigation is arbitrary and contrary to one of the basic functions of the grand jury. *United States v. Calandra, supra; Ealy v. Littlejohn, supra.*

There is much confusion on the question of how much information, and what type of information, will trigger a grand jury

investigation, since the issue has never been faced squarely by any court. The proposition that, whatever the information or whatever the source, an investigation is proper, is insupportable.

Were any other result to ensue, the grand jury system would be transformed into an agency of abject tyranny. If idle speculation, rumor, or calumny are sufficient predicates upon which a grand jury investigation may proceed, then no person is safe from the tentacles of a basely motivated prosecutor or a basely motivated source of information. What persons in public light, including Justices of this Court, have not been smeared by some statement of disgruntled rumor-mongers that the person is dishonest or has committed some criminal act? If such baseless information is sufficient to establish the propriety of a grand jury investigation, then star chamber procedures of the vilest sort are the law of the land, authorizing wholesale rummaging and fishing expeditions into the private affairs of any person, based on no facts whatsoever.

No court of record has ever articulated a standard respecting the threshold good-faith basis on which a grand jury investigation may lawfully be based. Rather, whenever the question of the propriety of the informational basis of a grand jury investigation is raised, the challenge appears to go to the category of information in the hands of the grand jury, and, in dealing with that question, the *dicta* set forth in *Branzburg v. Hayes* is trotted out to demonstrate that the grand jury's authority to commence an investigation can be based on virtually anything, whatever the category of information, be it rumor or tip.

This *dicta*, however, addresses only the quality of information possessed by the government and not whether that information is a sufficient basis upon which a grand jury subpoena may be enforced. In *Branzburg*, this Court, in discussing the historical role of the grand jury, stated that "an investigation may be triggered by tips, rumors, evidence proffered by the prosecutor, or the personal knowledge of the grand jurors." *Branzburg*, *supra*, at 701. The *dicta* of *Branzburg* has attained wide acceptance. *See United States v. Calandra*, 414 U.S. at 344; *United States v. Dionisio*, 410 U.S. at 15; *Matter of Special February 1975 Grand Jury*, 565 F.2d 407 (7th Cir. 1977); *United*

States v. Balliro, 558 F.2d 1177 (5th Cir. 1977); *Schwartz v. United States Department of Justice*, 494 F.Supp. 1268 (E.D. Pa. 1980). But *Branzburg* bases this proposition solely on *Costello v. United States*, 350 U.S. 359 (1956). An analysis of *Costello* demonstrates that the above-cited cases cannot stand for the proposition that any rumor, whatever it is, is sufficient to trigger a grand jury investigation.

In *Costello*, the petitioner, Frank Costello, was convicted of income tax evasion for the years of 1947, 1948 and 1949. Before trial, petitioner moved to dismiss the indictment, challenging whether there was sufficient competent evidence before the grand jury to return an indictment. The motion was denied; however, at trial it was adduced by defense counsel that, of the 144 witnesses who testified at trial, only three Internal Revenue Agents testified before the grand jury. The Internal Revenue agents' testimony before the grand jury was their summarization and computations of transactions which demonstrated that Costello necessarily received far more income than he reported. This so-called "net worth method" testimony is evidence admissible at trial, although technically hearsay. *United States v. Johnson*, 319 U.S. 503 (1943). At the close of the government case, petitioner again moved to dismiss the indictment "on the ground that the only evidence before the grand jury was 'hearsay,' since the three officers had no first hand knowledge of the transactions upon which their computations were based." *Costello*, 350 U.S. at 361. Again the motion to dismiss was denied.

On certiorari to this Court, petitioner asserted that an indictment *based only on hearsay* violated his Fifth Amendment right not to be held to answer for a crime "unless on a presentment or indictment of a Grand Jury . . ." because such an indictment is not supported by adequate or competent evidence.

This Court refused to lay down such a rule. Analyzing the question in terms of the historic purpose and practice of the Grand Jury, this Court held that: "An indictment returned by a legally constituted and unbiased grand jury, like an information drawn by a prosecutor, if valid on its face, is enough to call for trial of the charges on the merits. The Fifth Amendment requires

nothing more." *Id.* at 363. However, as pointed out in the concurring opinion of Justice Burton, "substantial and rationally persuasive evidence was presented to the grand jury." *Id.* at 364. In fact, the grand jury testimony of the three investigative agents, although technically hearsay, was the culmination of their investigative efforts containing the substance of the overwhelming evidence possessed by the government which could be used by the government at trial.

Costello does not stand for the proposition that hearsay of any type and amount is sufficient to support an indictment, or that a subpoena issued by a grand jury is enforceable because it is issued pursuant to an investigation triggered by a fifth-hand hearsay report asserting the possibility of a criminal violation. Obviously, the category of information received by a grand jury must be weighed and evaluated by the court, so that it can determine whether the information, whatever the category, provides a sufficient basis on which a grand jury investigation may be based. In this regard, all that *Costello* stands for is the proposition that an indictment for evasion of income taxes is valid if based on the net worth reports of Internal Revenue agents which, although technically hearsay, are admissible as competent evidence at trial.

Thus, the body of law which has arisen from *Costello*, and which states that a grand jury investigation can be based on less than direct evidence, is a perversion of the *Costello* holding. Moreover, the body of law does not address at all the question of the sufficiency of information — direct, circumstantial, hearsay or otherwise — which must be possessed before a grand jury subpoena may be enforced.

Despite thorough research, counsel have been unable to find a single case which squarely addresses the precise question raised herein. No case found by counsel quantifies the kernel of information which must be possessed by the United States Attorney or the Federal Bureau of Investigation before a grand jury investigation may validly occur and a subpoena issued in furtherance thereof be enforced. In this case, there is a substantial question raised by Petitioners as to whether either the United States Attorney or the Federal Bureau of Investigation possesses

ample and credible evidence concerning criminal offenses committed by specific persons, or whether, in fact, they are utilizing the grand jury's powers to engage in a fishing expedition. At the very least, then, the Court of Appeals erred in failing to require the district court to compel the United States Attorney to make the requisite "good-faith" showing that a proper basis exists for the issuance of the subpoena.

CONCLUSION

For all the foregoing reasons, a writ of certiorari should issue to the Court of Appeals for the Third Circuit so that this Honorable Court may review and correct the decision below.

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Date: November 5, 1985

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 84-1751

IN RE: GRAND JURY MATTER
DISTRICT COUNCIL 33 HEALTH AND WELFARE FUND, DISTRICT COUNCIL 33 LEGAL FUND and EARL STOUT,

Appellants

Appeal from the United States
District Court for the
Eastern District of Pennsylvania
(District Court G.J. No. 84-34-2)

Argued: May 1, 1985
Before: SEITZ, WEIS, and ROSENN,
Circuit Judges.
(Opinion Filed: August 9, 1985)

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OPINION OF THE COURT

SEITZ, *Circuit Judge*.

The appellants, District Council 33 Health and Welfare Fund, District Council 33 Legal Fund, and Earl Stout, appeal from an order of the district court denying their motion to quash a grand jury subpoena directed to District Council 33 of the American Federation of State, County and Municipal Employees ("District Council 33"). Appellate jurisdiction is asserted under 28 U.S.C. § 1291 (1982).

I.

On August 21, 1984, District Council 33 was served with a subpoena duces tecum requiring it to produce the following documents:

> Any and all ledger books, accounting records, and other documents reflecting all cash receipts, cash disbursements, accounts receivable, and accounts payable for District Council 33, District Council Health and Welfare Fund, and District Council 33 Legal Fund, for the period 6/1/82 to the present.

District Council 33 is an unincorporated association representing over 12,000 employees of the City of Philadelphia. The Health and Welfare Fund and the Legal Fund are separate trusts that were established to provide certain benefits to the members of District Council 33. Earl Stout is the president of District Council 33 and the Chairman of the Board of Trustees for each Fund.

District Council 33, the two Funds, and Earl Stout moved to quash the subpoena duces tecum in the district court. The two Funds and Earl Stout were treated by the court as third party intervenors. Contending that the government was utilizing the grand jury process for the sole purpose of harassing Stout, the movants noted that a prior grand jury investigation, which resulted in the issuance of an indictment against Stout, had culminated in a directed judgment of acquittal after trial.

Complying with a subpoena in connection with that earlier investigation had been costly and burdensome. Hence, the movants argued that they should not be required to comply with the subpoena because the government had not demonstrated a good faith basis for the grand jury investigation.

In response to the motion to quash, the government submitted a *Schofield* affidavit[1] in which it averred (1) that the grand jury was conducting an investigation into possible violations of various federal criminal statutes, including 18 U.S.C. § 1962 (1982) (RICO) and 18 U.S.C. § 1341 (1982) (mail fraud); (2) that the subpoenaed records were relevant and necessary to the grand jury investigation; (3) that the investigation was properly within the jurisdiction of the grand jury; (4) that there was no intent to harass; and (5) that the present investigation focused on allegations distinct from the earlier grand jury probe.

The district court denied the motion to quash, finding that the government had demonstrated the existence of a proper purpose for the subpoena through its *Schofield* affidavit. The movants thereafter petitioned the court to certify its order to permit an interlocutory appeal under 28 U.S.C. §1292(b)(1982). When this petition was denied, the Health and Welfare Fund, the Legal Fund, and Earl Stout (collectively "the appellants") appealed to this court pursuant to 28 U.S.C. §1291 (1982). District Council 33 is not among the parties bringing this appeal.

II.

We turn initially to the government's motion to dismiss on the ground that the appellants lack standing to appeal. It is well-settled that the denial of a motion to quash a grand jury subpoena is ordinarily not a final order for the purpose of an appeal. Rather, finality is achieved when the party to whom the subpoena is directed disobeys its commands and is subsequently cited for contempt. *United States v. Ryan*, 402 U.S. 530 (1971); *Cobbledick v. United States*, 309 U.S. 323 (1940); *Alexander v.*

1. *See In re Grand Jury Proceedings (Schofield I)*, 486 F.2d 85, 93 (3d Cir. 1973) and *In re Grand Jury Proceedings (Schofield II)*, 507 F.2d 963, 965 (3d Cir.), *cert. denied*, 421 U.S. 1015 (1975). The particular requirements of a *Schofield* affidavit are discussed *infra* § III.

United States, 201 U.S. 117 (1906). Where, however, a person lacks the opportunity to contest the subpoena by disobedience because it is not directed to him or her, an order denying a motion to quash is final as to that individual. *In re Grand Jury (C. Schmidt & Sons, Inc.)*, 619 F.2d 1022, 1024-27 (3d Cir. 1980). The only remaining question is whether such a person, who is acting as an intervenor with respect to the subpoena, has standing to appeal.

We first address the standing question with respect to the individual appellant, Earl Stout. As our prior decisions indicate, an individual or entity claiming a property right or privilege in the subpoenaed documents has standing to contest the denial of a motion to quash the subpoena. *See, e.g., William T. Thompson Co. v. General Nutrition Corp.*, 671 F.2d 100, 102-103 (3d Cir. 1982) (accountant-client privilege). As the government correctly notes, Stout has failed to assert any personal property right or privilege at stake and, in fact, has claimed no legitimate interest whatsoever in the subpoenaed materials. Accordingly, we hold that he has no standing to pursue this appeal.

The government further argues that the two remaining appellants, the Health and Welfare Fund and the Legal Fund, are without standing to appeal because they lack a proprietary interest in the subpoenaed materials. Arguably, however, the Funds may possess a proprietary interest in at least some of the records which District Council 33 was directed to produce. Because the standing constraints at issue here do not affect the subject matter jurisdiction of the federal courts, but rather, involve prudential limitations on the exercise of our jurisdiction, *see Duke Power Co. v. Carolina Environmental Study Group, Inc.*, 438 U.S. 59, 79-81 (1978), we will assume, without deciding, that the Funds have standing to appeal. Accordingly, we turn our attention to the merits of their appeal.

III.

The Funds argue that the district court erred in holding that the government's *Schofield* affidavit was sufficient to establish a proper purpose for the grand jury subpoena. They contend that

the government's affidavit was nothing more than a "mere boilerplate recitation" of the *Schofield* language. In *In re Grand Jury Proceedings (Schofield I)*, 486 F.2d 85, 93 (3d Cir. 1973), this court set forth the minimum requirements that the government must satisfy to survive a challenge to a grand jury subpoena. Under *Schofield I*, the government must file an affidavit affirming that the items sought are relevant to a grand jury investigation, properly within its jurisdiction, and not sought primarily for another purpose. The government's affidavit, while not a model of particularity, does set forth each of the required elements.

The Funds contend, however, that in view of the conclusory nature of the government's affidavit, the district court should have ordered additional discovery to satisfy itself fully that the subpoenaed materials were sought in connection with a proper grand jury investigation. In our second *Schofield* opinion, *In re Grand Jury Proceedings (Schofield II)*, 507 F.2d 963, 965 (3d Cir.), *cert. denied*, 421 U.S. 1015 (1975), we emphasized that "the decision to require additional investigation" beyond the *Schofield* affidavit, "is committed to the sound discretion of the district court." In deciding whether additional proceedings are warranted, the court must

> weigh the quite limited scope of an inquiry into abuse of the subpoena process, and the potential for delay, against any need for additional information which might cast doubt on the accuracy of the Government's representations.

507 F.2d at 965 (quoting *Schofield I*, 486 F.2d at 93).

Here, the fact that the government had unsuccessfully prosecuted Stout on similar charges in an earlier case must be weighed against the "limited scope of an inquiry into abuse of the subpoena process" and "the potential for delay." We do not believe that the district court abused its considerable discretion in denying the Funds' request for additional information. The Funds have put forth no evidence to substantiate their claims of harassment other than the government's prior prosecution of Stout. Given the generalized nature of their claims, the district

court could reasonably have found that the *Schofield* affidavit sufficiently negates any intent on the part of the government to harass the individuals or entities involved in this appeal.

Finally, we are unpersuaded by the Funds' admittedly novel argument that the government should be required to demonstrate "some kernel of information" relevant to the commission of a specific crime before a grand jury subpoena may be enforced. The Supreme Court rejected a similar contention in *Branzburg v. Hayes*, 408 U.S. 665 (1972), a case involving a first amendment challenge to a grand jury subpoena of a reporter's records and notes. The tremendous breadth of the grand jury's investigatory powers is underscored by the Court's often quoted comment that "(s)uch an investigation may triggered by tips, rumors, evidence proferred by the prosecutor, or the personal knowledge of the grand jurors." 408 U.S. at 701. Indeed, the grand jury is

> a body with powers of investigation and inquisition, the scope of whose inquiries is not to be limited narrowly by questions of propriety or forecasts of the probable result of the investigation, or by doubts whether any particular individual will be found properly subject to an accusation of crime. As has been said before, the identity of the offender, the precise nature of the offense, if there be one, normally are developed at the conclusion of the grand jury's labors, not at the beginning.

Blair v. United States, 250 U.S. 273, 282 (1919).

Grand jury proceedings are entitled to "a presumption of regularity." *Schofield I*, 486 F.2d at 92. Thus, the party objecting to the enforcement of a grand jury subpoena has the burden of demonstrating some irregularity in those proceedings. *Id.* Should a party present credible evidence that a particular subpoena was issued to further an illegitimate purpose, the district court may in its discretion require additional justification for that subpoena under our existing *Schofield* rule. Consequently, we see no reason to expand the *Schofield* requirements to include a showing of the existence of a specific crime under investigation by the grand jury.

IV.

Earl Stout's appeal from the district court's order denying the motion to quash the grand jury subpoena will be dismissed. The order of the district court will be affirmed as to the remaining appellants.

A True Copy:
Teste:

Clerk of the United States Court of Appeals
for the Third Circuit

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

IN RE:	:	
	:	
GRAND JURY MATTER	:	MISC. NO. 84-34-2

MEMORANDUM OPINION AND ORDER

WEINER, J. NOVEMBER 16, 1984

Pursuant to its investigation of possible violations of 18 U.S.C. §1962 (RICO) and 18 U.S.C. §1341 (Mail Fraud), a grand jury has ordered District Council 33 AFSCME ("DC33") to produce the following documents:

> Any and all ledger books, accounting records, and other documents reflecting all cash receipts, cash disbursements, accounts receivable, and accounts payable for District Council 33, District Council 33 Health and Welfare Fund, and District Council 33 Legal Fund, for the period 6/1/82 to the present.

In accordance with *In Re Schofield* (*"Schofield I"*), 486 F.2d 85 (3d Cir. 1973), the Government filed an affidavit averring that the records sought are relevant and necessary to the investigation within the grand jury's jurisdiction. The Government also avers that the records are being sought for no other purpose and that the investigation is being conducted on a good faith basis and without any intent to harass any individuals or entities. Finally, the Government avers that the grand jury's investigation is focusing on allegations distinct and separate from those involved in the 1978-1980 grand jury investigation that resulted in the filing of a criminal indictment against DC 33 President Earl Stout ("Stout").

Presently before the court is the motion of Stout and DC 33 to quash the subpoena. Essentially, the movants contend that, in view of Stout's acquittal of the charges arising under the 1980 indictment, the present investigation constitutes a continuing effort to harass Stout. For the reasons which follow, the motion to quash is denied.

Generally, a presumption of regularity attaches to grand jury subpoenas. *Schofield I*, *supra*, 486 F.2d at 92. Thus, "the party objecting to enforcement has the burden of making some showing of irregularity." *Id*. However, due to the secrecy of grand jury proceedings, the party seeking enforcement of the grand jury subpoena is "required to make some minimum showing of the existence of a proper purpose before it can trigger the enforcement machinery of the judicial branch." *Id*. The minimum requirement imposed on the Government is an affidavit affirming that "each item [requested] is at least relevant to an investigation being conducted by the grand jury and properly within its jurisdiction, and is not sought primarily for another purpose." *Id*. at 93.In *Schofield II*, 507 F.2d 293 (3d Cir. 1975), the court noted that, "Relevancy, in the context of a Grand Jury proceeding is not probative relevancy, for it cannot be known in advance whether the document produced will actually advance the investigation. It is rather a relevancy to the subject matter of the investigation." 507 F.2d at 967 n. 4.

As previously stated, the affidavit filed by the Government in the matter *sub judice* avers that the grand jury is investigating possible violations of the RICO and mail fraud statutes. It states that the requested documents are relevant and necessary to this investigation. It further states that the subpoena was issued in good faith and for no purpose other than furthering the investigation. This is sufficient to comply with the minimum showing requirements of *Schofield*.

Having satisfied these minimum requirements, the burden is on the movants to show an irregularity in the issue of the subpoena. Stout argues that, having been acquitted of the charges arising under his 1980 indictment, the present grand jury investigation constitutes harassment. The Government's *Schofield* affidavit specifically states, however, that the grand jury's investigation is focusing on allegations separate and distinct from those involved in the 1978-1980 grand jury investigation that resulted in the filing of the 1980 indictment against Stout. Absent bad faith, which the movants have not established, a past indictment does not necessarily taint a grand jury subpoena, issued

pursuant to a different investigation, with the stain of irregularity. Accordingly, we find that the movants have failed to carry their burden on this motion.

An appropriate order follows.

EXHIBIT "A"

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

IN RE:	:	
	:	
GRAND JURY MATTER	:	MISC. NO. 84-34

NOVEMBER 16, 1984

ORDER

All papers filed in the above-captioned matter are hereby SEALED and IMPOUNDED.

The motion of District Council 33 and Earl Stout to quash the grand jury subpoena and for an order granting discovery is DENIED.

IT IS SO ORDERED.

CHARLES R. WEINER

EXHIBIT "B"

OBJECT OF THE SCHEME

22. The object of the above scheme and artifice was to obtain money and things of value for the benefit of defendants EARL STOUT and PETER J. SERUBO, their friends, families and businesses in which they had an interest.

MANNER AND MEANS

23. The manner and means by which the above scheme and artifice were carried out were:

(a) The systematic seeking, demanding and obtaining of money, gifts and other things of value for the benefit of the defendants EARL STOUT and PETER J. SERUBO, their friends, members of their families and business activities under their influence or control, from vendors and contractors seeking to do business, and retain business, with District Council 33 and its related entities;

(b) The awarding of contracts and payments of money and other things of value, directly and indirectly, to business activities controlled by the defendant PETER J. SERUBO and friends of the defendant EARL STOUT for services purportedly rendered to District Council 33 and its related entities; and

(c) The use of the following false and fraudulent pretenses and representations and material omissions knowingly and willfully made and caused to be made by defendants EARL STOUT and PETER J. SERUBO:

EXHIBIT "C"

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

UNITED STATES OF AMERICA	:	CRIMINAL
	:	
v.	:	
	:	
EARL STOUT and	:	
PETER J. SERUBO	:	NO. 80-110

Philadelphia, Pennsylvania
Tuesday, November 25, 1980

Before HON. JOSEPH S. LORD, III, Chief Judge
(And a jury of 12 and 3 alternates)

TWENTY-FIRST DAY

GRANTING OF DEFENDANTS' MOTIONS
FOR JUDGMENT OF ACQUITTAL

REMARKS OF THE COURT TO THE JURY

APPEARANCES:

PETER J. SMITH, ESQ.,
Chief, Special Prosecutions Division,
United States Attorney's Office,
and
LUTHER E. WEAVER, ESQ.,
Assistant United States Attorney,
for the Government

RICHARD A. SPRAGUE, ESQ.,
ROBERT E. MADDEN, ESQ.,
for Defendant Earl Stout

HARVEY A. SERNOVITZ, ESQ.,
for Defendant Peter J. Serubo

THE COURT: All right. We will take a recess.
(Recess taken at 10:38 a.m.)

(Jury enters the courtroom at 10:47 a.m.)

THE COURT: I will grant the defendants' Motions for Judgment of Acquittal.

Members of the jury, you have been extraordinarily patient, attentive and conscientious. We have been sitting here during one of the most solemn phases not only of our law but of our lives, and that is the trial of two individuals for a criminal offense; accused by the United States of a criminal offense.

Because of the gravity and seriousness of that, the law is strict. You heard and you remember during your voir dire that mere suspicion is not enough to convict; there must be evidence that will convince you beyond a reasonable doubt.

I have no doubt that there is suspicion in your minds or there may be, there may be suspicion in my mind, but under our law — and we should be thankful to God for it — people cannot be convicted on "suspicion."

The defendants have moved for a judgment of acquittal. That means that they argued that the Government has not shown that the crimes charged in the Indictment have been committed.

Counts 2 to 5 refer to AHP, the health plan, the dental plan. All that I see there is a contract between Kravitz and Serubo. The charge is not defrauding Kravitz, the charge is defrauding the union, and the union didn't pay that money, except the way anybody pays money to a broker.

Not only that, but the evidence was that this plan could not have been gotten cheaper anyplace else or as cheaply.

The evidence was that it was a good plan; that it was the best plan that they could get.

The evidence was that the plan is still being used happily by the union.

The evidence was that even after Kravitz ceased paying commissions to Serubo, the union went on at the same rate. You might have a "suspicion," but there is no proof of any defrauding of the union.

The other counts that are left, the counts about Ducat, we had the same thing. We had a contract between Serubo and Ducat, and Ducat fought vigorously on the commission. He came up from an offer of 10 percent, Serubo came down from a demand of 25 percent, and they met not in the middle, but at 14 percent. Again, that was between Ducat and Serubo, and again there is no showing that the union was defrauded of anything in that case.

I won't go through all of the counts with you, members of the jury. I tell you these so that you will know — and I think by this time you do know — that I have given long, serious and concentrated attention to the evidence in this case because I realize that as it is important to Peter Serubo and Earl Stout as human beings, it is also important to the United States Government that I act fairly and properly as far as I can see and as far as my own conscience guides me and my view of the law. I have tried to do that.

We can never say of ourselves that we have succeeded because we don't know. We think we have. I think I have here and I think that the Government's evidence, painstaking though it was — and I have to compliment both sides on the presentation of this case, the thoroughness with which it was prepared and the thoroughness with which it was defended — but in spite of that I feel that the Government has fallen short of proving that a crime has been committed.

Therefore, I grant the defendants' Motions for a Judgment of Acquittal.

We will recess.

(Concluded at 10:55 a.m.)

EXHIBIT "D"

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

UNITED STATES OF AMERICA	:	CRIMINAL
	:	
v.	:	
	:	
EARL STOUT and	:	
PETER J. SERUBO	:	NO. 80-110

Philadelphia, Pennsylvania
Friday, November 21, 1980

Before HON. JOSEPH S. LORD, III, Chief Judge
(And a jury of 12 with 3 alternates)

NINETEENTH DAY

PARTIAL TRANSCRIPT
EXCERPTS RELATING TO NEWSPAPER PUBLICITY

I realize there is a publicity problem, but counsel certainly had the opportunity certainly to request a sequestered jury, and they were adamantly opposed to it during this case.

I think I will state preliminary, Your Honor, the Government would object to holding those arguments in camera. It is an important case, these are important issues, and I think we have got to do it right and not only does it have to be done right, it has got to appear right, and I think that argument has to be made in open court.

THE COURT: Well —

MR. SMITH: I will discuss it with Mr. Vaira, Your Honor, and I am not doing it to try to create a problem with the jury, but this is not just a typical chambers conference or a side bar.

MR. SPRAGUE: Well, I have one quick response I want to make.

The concern has to be the rights of the defendants who are on trial here, and I have had enough of what the Government has been doing in this case, and there is no reason why any and all of the arguments made in chambers would not be available to the press subsequently in terms of any transcript in any way.

THE COURT: I agree with Mr. Smith that it ought to be done right, but from the type of reporting that I have seen in this case it certainly isn't "done right" at all.

This has been the most slanted, the most inaccurate kind of reporting. The headline the other night was something about (pause) "Accountant fired after telephone call," or something like that.

MR. SMITH: Yes, and this morning's headline in the Inquirer was that Katz denied that he asked for a million dollars, and Katz, you know, Katz didn't ask for a million dollars, and I don't even think he ever had to deny it.

I agree, Your Honor, we are victims, we are all victims of that problem.

THE COURT: I think it is my obligation to protect the "victims" that are before me. I don't think I have any obligation to the public whatsoever, and I certainly don't have any obligation to the media.

MR. SMITH: Your Honor, I don't want to argue that issue, but I do want to emphasize that Mr. Sprague has said that certainly the transcript of the Rule 29 arguments ought to be made available as soon as possible.

MR. SPRAGUE: Now, wait a minute. I didn't say "as soon as possible."

MR. SMITH: You said the transcript will be made available. It won't be any good if it is "made available" five years from now.

MR. SPRAGUE: All I am saying is: At the

* * *

THE COURT: No.

MR. SPRAGUE: And may I say this, Your Honor, because I have got pretty strong feelings about the way in which I think the Government has handled this case.

In the event the Court should grant our motions, the Court will obviously make its ruling in open court and the Court will then speak and say whatever the Court wants, and that is what is presented then to the public.

We have these side bars so the jury doesn't hear what is being said, and what the Government really is saying, "The jury shouldn't be here as we are having these arguments, but let them go home, let the news media then have access, let them distort what is said so the jury that is not supposed to be here when we are arguing will then get it through a distorted version by the news media."

THE COURT: All right.

MR. SMITH: Your Honor, that is not the objective: that is not the point I was raising.

THE COURT: Well, whatever the "objective" is, however you phrase it, there is the constant tension of fair trial and free press, but there is one thing that the First Amendment does not guarantee, does not specifically speak to, and that is the obligation, the concurrent obligation or the concommitant obligation of the media to be accurate and honest, and these media are not, they are not. Okay?

* * *

open court.

I think, Your Honor, that it is encumbent upon the party seeking to have the argument in chambers — and that I believe is defense counsel, defense counsel for Mr. Stout specifically — to come forward with some reason to establish a basis for concluding that there is no alternative to ensure a fair trial other than having the proceedings in chambers.

This is an important case. Very serious allegations have been made in arguments by the defense as to misleading by the Government, governmental misconduct, and indeed strong arguments that the case should never have been brought in the first place.

If that is the underlying thrust of the arguments that are going to be made at the Rule 29 discussion, then it is the Government's position, and it is my position personally as the person to whom many of these arguments personally have been addressed, that that ought to be done in open court rather than in chambers.

THE COURT: Mr. Smith, it is true that there might be references to evidentiary matters which are already before the jury.

The difficulty is that those evidentiary matters, in the reporting of them by the media, were distorted, they were slanted, they were inaccurate, they were unfair, and they were prejudicial to the defendant.

The jury, however, was not harmed by that because the jury heard the evidence; the jury heard and could evaluate the evidence for themselves. This the jury will not have heard and I have no doubt that the report on this will be just as slanted, just as biased, just as unfair as the reporting has been in the past, and the jury will not have a chance to weigh that against what they heard.

Is there anything you wish to say, Mr. Sprague?

MR. SPRAGUE: No, Your Honor, except I would add that it is interesting that even the Government this morning recognized that as these arguments were to be made the jury should not be here, and what I was going to say is: If the thing is going to be subject to distorted kind of reporting, then it is better that

the jury be here and hear it itself, which it obviously would not be doing.

Furthermore, Your Honor, there is not the slightest doubt that during any trial there are many, many matters and motions that are taken up with the Court at side bar so these matters do not come before the jury at that time.

What is now being presented quite properly, depending upon the final ruling of the Court, should not come before the jury. The Government knows that.

I urge the Court to stick to its ruling.

THE COURT: Well, for the reasons that I have outlined and already put on the record, and that is the unfair reporting, I will adhere to my decision.

There is, as I mentioned at side bar this morning, along with the freedom of the press, a concurrent duty, a concommitant duty to report fairly and accurately what the press hears and not in such a way as to improperly prejudice a defendant in a criminal case.

The First Amendment in my judgment is not a one-way street, and when the press abuses its rights under the First Amendment, at this stage of the game there is only one way to cure it, and that is to hold the arguments in chambers.

It is too late now to have a sequestered jury. Neither side requested a sequestered jury according to my recollection, and it is too late now of course to sequester the jury.

So, the only thing I can do is to hold the arguments in chambers.

MR. SPRAGUE: May I also add, Your Honor, if I may.

During the course of this trial — it has in fact been so observed by me personally — at the conclusion of testimony at the end of the day interviews being given by the government prosecutors here with the press. I advise the Court: Not one interview has been given by the defense.

MR. SMITH: Your Honor, I will object to that statement as being false. There have not been interviews

EXHIBIT "E"

IN RE: GRAND

JJR:rms **SUBPOENA TO TESTIFY BEFORE GRAND JURY** JURY MATTER, 84-34

United States District Court

DISTRICT: EASTERN DISTRICT OF PENNSYLVANIA

TO:
District Council 33 AFSCME
3001 Walnut Street
Phila., PA

SUBPOENA FOR:
☐ Person
☒ Document or Object

A-26

YOU ARE HEREBY COMMANDED to appear in the United States District Court at the location, date and time specified below to testify before the Grand Jury in the above entitled case.

PLACE:
U. S. Courthouse
601 Market Street
Phila., PA 19106

COURTROOM:
Grand Jury Rm. No. 4722

DATE AND TIME:
August 27, 1984
at 9:30 a.m.

YOU ARE ALSO COMMANDED to bring with you the following document(s) or object(s):(1)

Any and all ledger books, accounting records, and other documents reflecting all cash receipts, cash disbursements, accounts receivable, and accounts payable for District Council 33, District Council 33 Health & Welfare Fund, and District Council 33 Legal Fund, for the period 6/1/82 to the present.

☐ *Please see additional information on reverse*

This subpoena shall remain in effect until you are granted leave to depart by the court or by an officer acting on behalf of the court.

CLERK: Michael E. Kunz

(BY) DEPUTY CLERK:

DATE: 6/20/84

This subpoena is issued on application of the United States of America by:

NAME, ADDRESS AND PHONE NUMBER OF ASSISTANT U.S. ATTORNEY
JOHN J. ROSENBERG, AUSA
3310 U.S. Courthouse
601 Market Street
Phila., PA 19106
PHONE: 215-597-9458

(1) If not applicable, enter "none."

To be used in lieu of AO 110 Replaces USA-178 which is obsolete FORM OBD 22 FEB 83